

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ANTHONY L. GAINES

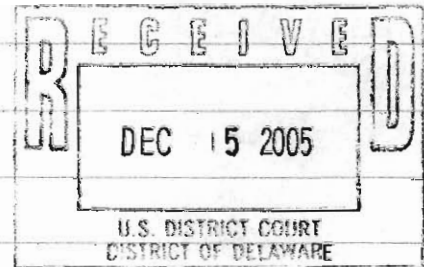
PETITIONER

Civ. Act. No. 05-555-JJF

THOMAS CARROLL, warden

AND M. JANE BRADY,
Attorney General of the
State of Delaware

RESPONDENTS



Plaintiff Response To The
ANSWER DEFENDANTS MOTION TO DISMISS

COMES NOW THE DEFENDANT ANTHONY L. GAINES PRO-SE,
RESPONSE TO THE DEFENDANT'S ANSWER MOTION TO DISMISS,
IN SUPPORT ASSERTS THE FOLLOWING:

■ The petitioner, ANTHONY L. GAINES, has applied for federal habeas relief challenging a finding by the Delaware Superior Court that he had violated the conditions of his probation.

1. GAINES has previously pled guilty and been sentenced in January 2001 for second degree burglary. GAINES V. STATE, No. ■ 23. PETITIONER WAS SENTENCED BY SUPERIOR COURT JUDGE GEPELEIN, TO FIVE YEARS SUSPENDED FOR SIX MONTHS. LEVEL 5, SIX MONTHS LEVEL 4. HOME CONFINEMENT

18 MONTHS LEVEL 3, TWO YEARS, SIX MONTHS LEVEL 2.
(SUPER. CT. CRIM DKT IN ID No. 0002014423--ITEM 23).

2.) 12-06-2001 PETITIONER VIOLATED CONDITION OF PROBATION

3.) 12-20-2001 SUPER. CT. JUDGE: GEBELEIN SENTENCE
PETITIONER TO 2 YRS. LEVEL 5, 1 YR. 9 MTHS. LEVEL IV.
(SUPER. CT. CRIM DKT IN ID No. 0002014423--ITEMS 34).
SENTENCE: OFF-LINE SENTENCE ORDER SIGNED AND FILED
12-26-01. SEE FILE FOR ACTUAL ORDER--ONLINE VERSION IS
NOT VERBATIM.

4.) 12-20-2001 SUPER. CT. JUDGE: GEBELEIN CREDITED
PETITIONER 9 MTHS TIME SERVED. (SUPER. CT. CRIM. DKT IN
ID No. 0002014423--ITEM 40).

5.) 01-14-2002 PETITIONER MOTION FOR MODIFICATION OF
SENTENCE FILED. REFERRED TO JUDGE: GEBELEIN ON 1-23-02
(SUPER. CT. CRIM. DKT IN ID No. 0002014423--ITEM 36).

6.) 01-22-2002 PETITIONER APPEAL FILED IN SUPREME COURT
(SUPER. CT. CRIM. DKT IN ID No. 0002014423--ITEM 35).

7.) 01-17-2001 PETITIONER ENROLL IN KEY NORTH PROGRAM.

8.) 02-27-2003 PETITIONER MOTION FOR MODIFICATION
OF SENTENCE FILED PRO SE, REFERRED TO PRESENTENCE
2-27-03 FOR JUDGE: GEBELEIN.

(Super. Ct. Crim. Dkt in ID No. 0002014423--Item 46).

9.) 03-07-2003 PETITIONER'S Motion for Reduction/Modification of SENTENCE is GRANTED For the following REASON(S):
LEVEL IV SENTENCE is Modified to READ: 1 year 9 months At LEVEL IV, SUSPENDED for 6 month LEVEL IV Work RELEASE.
(Super. Ct. Crim. Dkt in ID No. 0002014423--Item 47), (51).

10.) 03-01-2004 PETITIONER (MAX OUT) Completed LEVEL IV SENTENCE ON LEVEL 5.
(DE. Dept of Corr. Offender Status Sheet).

11.) 06-22-2004 PETITIONER Violated LEVEL 3. Probation. Administrative Warrant filed. (06-24-2004).
(Super. Ct. Crim. Dkt in ID No. 0002014423--Item 55).

12.) 07-09-2004 PETITIONER SENTENCED Violation of Probation Hearing. Super. Ct. Crim. Judge: Herlihy. A REVIEW of the Super. Ct. Dkt REVEALS that Judge: GEBELEIN WAS PETITIONER'S SENTENCING JUDGE AND NOT Judge: Herlihy. Changing FROM Judge: GEBELEIN to Judge: Herlihy without NOTIFICATION, VIOLATES RULE 82 DEL. LAWS AND 5th, 8th AMENDMENT OF U.S. CONSTITUTION. DUE PROCESS CLAUSE. 14th AMENDMENT OF U.S. CONSTITUTION. EQUAL TREATMENT, EQUAL PROTECTION UNDER THE LAW. PETITIONER HAS A right to prior NOTIFICATION of CHANGE OF ASSIGN JUDGE ESPECIALLY SINCE Judge: GEBELEIN WAS FAMILIAR WITH ALL OF THE FACTS OF PETITIONER'S CASE while Judge: Herlihy WAS NOT. (Super. Ct. Crim. Dkt in ID NO.

0002014423--ITEM 55).

13.) Super.Ct. Judge: Herlhy SENTENCE petitioner to 2 yrs level 5. Judge change sentence to be given credit for 6 mths. petitioner SERVED ON LEVEL 5. WAITIN FOR BED SPACE AT LEVEL 4. Judge change sentence to be modified upon recommendation of TASC Monitoring or Evaluation. SEE: Super.Ct. Transcripts, 07-9-2004, SEE: DE. DEPT OF CORR. OFFENDER STATUS SHEET. DEL LAWS. TIS SENTENCING GUIDELINES STATE OFFENDER IS TO KNOW HIS SENTENCE AT TIME OF SENTENCING. PETITIONER WAS NOT NOTIFIED UNTILL 04-04-05 by post mail.

14.) Super.Ct. Judge: Herlhy ERRORED UPON SENTENCING petitioner for violation of probation, he should have BEEN GIVEN LEVEL V CREDIT FOR THE TIME HE SERVED AT LEVEL V IN CARCERATION WHILE WAITING FOR AVAILABLE SPACE AT LEVEL IV WORK RELEASE. Gamble V. State, 728 A.2d 1171 (DEL. 1999).

15.) TIS Guideline state OFFENDER VIOLATE CONDITION OF Probation is to be moved up ONE LEVEL. BROWN V. STATE, 449 A.2d 269 (DEL. 1988). WHERE THERE IS NO COMPETENT EVIDENCE UPON WHICH TO BASE THE EXERCISE OF SOUND JUDICIAL DISCRETION, THE REVOCATION OF PROBATION AND THE IMPOSITION OF PRISON SENTENCE CONSTITUTES AN ABUSE OF DISCRETION.

16.) SUPER. CT. JUDGE: HERELBY ABUSE his discretion WHEN SENTENCING PETITIONER to 2yrs LEVEL 5. Dkt 9-9-04 DE ST TI 11 § 4334 Page 2. This SECTION DOES NOT GRANT AUTHORITY TO ENLARGE A PERIOD OF PROBATION ONCE IMPOSED. Tiller V. STATE, 257 A.2d 385 (DEL. 1969).

17.) THE Superior Court lacks the power to extend a probation period, SINCE probation is a STATUTORY CREATURE AND its implementation MUST BE IN ACCORDANCE WITH THE POWERS FOUND WITHIN THE STATUTE. Tiller V. STATE, 257 A.2d 385 (DEL. 1969).

18.) DE ST TI 11 § 4204 Page 5. The trial court could impose drug treatment AS A CONDITION OF A VIOLATION OF PROBATION UNDER subdivision (C)(8) of this SECTION; the DEPARTMENT OF CORRECTIONS could DETERMINE treatment NEEDS AND completion UNDER 11 DEL. C. § § 6504 AND 6531. Melody V. STATE, 825 A.2d 239 (DEL. 2003).

19.) DE ST TI 11 § 4204 Page 5 A SENTENCING COURT HAS broad discretion IN DETERMINING what information TO RELY ON FROM A PRESENTENCE REPORT AND RELATED SOURCES. THUS, IN REVIEWING A SENTENCE WITHIN STATUTORY limits, THE SUPREME COURT WILL NOT FIND ERROR OF LAW OR ABUSE OF discretion UNLESS it is CLEAR FROM THE RECORD below THAT A SENTENCE HAS BEEN IMPOSED ON THE BASIS OF demonstrable FALSE information OR information lacking a minimal indicium of reliability. Mayes V. STATE, 604 A.2d 839 (DEL. 1992).

20.) COURT APPOINTED ASSISTANCE OF COUNSEL WAS INEFFECTIVE BY NOT ORDERING PRESENTENCE INVESTIGATION WHICH WOULD HAD PROVE PETITIONER DIDN'T HAVE 2 YRS. LEFT ON SENTENCE. ENHANCED HIS SENTENCE WHICH AMOUNTED TO DOUBLE JEOPARDY. PETITIONER FORCED TO SERVE TIME HE HAS ALREADY SERVED. IN WHICH VIOLATES DEL LAWS AND/OR DEL CONSTITUTION UNDER DUE PROCESS, AS WELL AS THE PETITIONER'S U.S.C.A. RIGHTS; THEREFOR DEEMING THE PETITIONER'S SENTENCE ILLEGAL.

21.) 08-10-2004 PETITIONER MOTION FOR MODIFICATION OF SENTENCE FILED PRO SE. REFERRED 8-10-04 FOR JUDGE HERLIHY (MOTION FOR TIME PREVIOUSLY SERVED) (SUPER. CT. CRIM. DKT IN ID NO. 0002014423--ITEM 58.)

22.) 08-10-2004 PETITIONER FILED HABEAS CORPUS TO SURPOR ILLEGAL SENTENCE. PETITIONER FILED LETTER TO SUPER. CT. CONCERNING STATUS OF HABEAS CORPUS. CT. EXPLAINING NO HABEAS CORPUS PETITION RECEIVED BY CT. PETITIONER FILED PETITION ON 08-05-2005 AT S.C.J. GEORGETOWN, DE. LAW LIBRARY PARALEGAL MRS. PALMER, MAILED BOTH HABEAS CORPUS, AND MOTION FOR TIME PREVIOUSLY SERVED IN SAME PACKAGE, INMATE - PETITIONER NOT ALLOWED TO MAIL LEGAL DOCUMENTS ONLY MRS. PALMER.

23.) PETITIONER FILED LETTER TO PUBLIC DEFENDERS OFFICE ASSISTANCE WITH MODIFICATION OF VOP SENTENCE ON 6-22-04

24.) SEE: Super. Ct. Crim Dkt in ID No. 0002014423 Item 60

25.) 01-18-2005 TASC RECOMMENDED NO CHARGE IN LEVEL 5 SENTENCE. PETITIONER WORKED WITH COUNSELOR AT S.C.I. GEORGETOWN, TASC SUPERVISOR JACKIE MARSH, DOVER, SMYRNA OFFICE. FOR WILM, TASC OFFICER TO COME EVALUATION PETITIONER FOR OVER 6 MONTHS. MR. MARTIN TASC OFFICER AT 108 S. HARRISON ST. WILM, DE. WHICH WAS ALSO MY DISCIPLINARY COUNSELOR AT KEY NORTH PROGRAM. I PARTICIPATE IN NOT OVER 1 YR. I WAS TOLD BY GANDER HILL MEDICAL DEPT. I MAY HAVE HIGH BLOOD PRESSURE. COUNSELOR MARTIN ORDERED DISCIPLINARY SANCTION. WHICH IS A CONFLICT OF INTEREST AND VIOLATION OF DUE PROCESS, ALSO WITH EQUAL PROTECTION UNDER THE LAW.

26.) Super. Ct. DON'T ANSWER MOTION FILED 08-10-2004 UNTILL 01-18-2005 WHICH VIOLATION OF PETITIONER'S DUE PROCESS. (Super. Ct. Crim. Dkt in ID No. 000201442: -- ITEM 61.)

27.) D.C. DE. DEPT OF CORR. PLACED PETITIONER IN ADMINISTRATIVE SEGREGATION ON 9-22-2004, PETITIONER WAS NOT PROVEN TO HAVE VIOLATED S.C.I. RULES. PETITIONER WAS ALLEGED IN A ALTERCATION, BOTH C. WILLIAMS AND PETITIONER STATED THEY WAS NOT FIGHTING. PETITIONER WAS DENIED COUNSELOR, WITNESS, ADJUSTMENT COMMITTEE AND RIGHT TO APPEAL. PETITIONER WAS TRANSFER TO D.C. S.H.U. 9-24-2004 MAX SECURITY WITHOUT DUE PROCES.

28.) PETITIONER IS PRESENTLY INCARCERATED IN THE ADMINISTRATIVE SEGREGATION (SHU) SECURITY HOUSING UNIT, AND HAS VERY LIMITED ACCESS TO LEGAL MATERIAL. I MUST SUBMIT WRITTEN REQUEST FOR SPECIFIC MATERIALS. HOWEVER, I CAN'T EFFECTIVELY DO BECAUSE, I LACK ACCESS TO THE VERY LEGAL MATERIAL THAT WOULD ADVISE ME OF EXACTLY WHAT LEGAL MATERIAL I NEED THIS OPPRESSES ME FROM PROPERLY PETITIONING TO THE COURTS.

29.) 04-01-2005 PETITIONER FILED WRIT OF HABEAS CORPUS (PRO SE) REFERRED TO JUDGE CARPENTER FOR JUDGE GEBELEIN, ROTATION. (SUPER. CT. CRIM DKT IN ID No. 0002014423 ITEM 63.)

30.) 04-08-2005 PETITIONER FILED WRIT OF HABEAS CORPUS IS DENIED SO ORDERED JUDGE HERLIHY (SUPER. CT. CRIM DKT IN ID No. 0002014423 ITEM 64).

31.) 05-17-2005 NOTICE OF NON-COMPLIANCE TO RULE 61 (MOTION FOR POSTCONVICTION RELIEF) MOTION MUST CONTAIN MOVANT'S ORIGINAL SENTENCE. PETITIONER MAILED CT. NEXT DAY OF RECEIVING NOTICE. ORIGINAL SIGNATURE. MOTION FOR POSTCONVICTION RELIEF FILED. PRO SE REFERRED TO JUDGE HERLIHY (SUPER. CT. CRIM. DKT IN ID No. 0002014423 ITEM 66).

32.) 08-01-2005 PETITIONER FILED WRIT OF HABEAS CORPUS IN U.S. DISTRICT COURT DISTRICT OF DELAWARE (Wilmington)

33. PETITIONER STATED RESPONDENTS ANSWER TO U.S. DISTRICT COURT. PETITIONER FILED TIMELY MOTION FOR RELIEF SEE: 08-10-2004 SUPER. CT. CRIM. DKT. IN ID NO. D002014423 ITEM 58).

34. PETITIONER EXHAUSTED REMEDIES AVAILABLE IN THE STATE COURT. SUPER. CT. CRIM. DKT ID NO. D002014423 A REVIEW OF WILL REVEAL THE PETITIONER FILED EVERY RELIEF AVAILABLE.

CONCLUSION

BASED UPON THE SUPERIOR COURT DOCKET SHEET, PETITIONER HAS PROVEN COURT DIDN'T CREDIT PETITIONER TIME SERVED (SUPER. CT. CRIM DKT. IN ID NO. D002014423 ITEM 34). OFFLINE SENTENCE ORDER SEE ACTUAL FILE. ALSO SUPER. CT. TRANSCRIPT 7-9-04.

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF HABEAS CORPUS SHOULD BE **GRANTED**.

DATE:

Anthony L. Gaines
ANTHONY L. GAINES
181314/SHU.19.B211
DE. CORRECTIONAL CENTER.
1181 Paddock Road.
Smyrna, DELAWARE.
19977

Exhibit #1 Deputy Attorney General SUPER Ct.
Crim. DOCKET. IS OUT OF ORDER. SEE: 66, 68, 67.

Exhibit #2. PETITIONERS SUPER Ct. Crim. DOCKET IS
IS ORDER SEE: 66, 67, 68.

*Deputy Attorney General*SUPERIOR COURT CRIMINAL DOCKET
(as of 11/21/2005)

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State of Delaware v. ANTHONY L GAINES
State's Atty: RICHARD J ZEMBLE , Esq.
Defense Atty:DOB: 01/30/1962
AKA: ANTHONY GAINES
TONY GAINES

No.	Event Date	Event	Judge
		DEFENDANT'S LETTER FILED CONCERNING STATUS OF HABEAS CORPUS AND COPY OF SENTENCING ORDER, ETC. SENT COPY OF DOCKET, SENTENCING ORDER, AND OTHER FORM REQUESTED EXPLAINING NO HABEAS CORPUS PETITION RECEIVED BY THIS COURT AT THIS TIME.	
60	09/16/2004	LETTER FROM: ANTHONY GAINES TO: PUBLIC DEFENDERS OFFICE RE: MODIFICATION OF VOP SENTENCE ON 6/22/04	
61	01/18/2005	ORDER MOTION FOR MODIFICATION OF SENTENCE DENIED. TASC RECOMMEND NO CHARGE IN LEVEL 5 SENTENCE BUT DOES RECOMMEND A MENTAL HEALTH EVALUATION WHILE THERE.	HERLIHY JEROME O.
62	01/19/2005	MODIFIED ASOP VOP SENTENCE ORDER SIGNED AND FILED 1/20/05.	HERLIHY JEROME O.
63	04/01/2005	PETITION FOR A WRIT OF HABEAS CORPUS FILED (PRO SE) REFERRED TO JUDGE: CARPENTER FOR JUDGE GEBELEIN ROTATION DATE REFERRED: 4/1/05 CIVIL CASE NO: 05M-04-003	
64	04/08/2005	ORDER: DEFENDANT'S PETITION FOR A WRIT OF HABEAS CORPUS IS DENIED. IT IS SO ORDERED JUDGE HERLIHY	BARRON TIMOTHY H.
65	05/17/2005	NOTICE OF NON-COMPLIANCE TO RULE 61 (MOTION FOR POSTCONVICTION RELIEF) SENT TO DEFENDANT. MOTION MUST CONTAIN MOVANT'S ORIGINAL SIGNATURE.	HERLIHY JEROME O.
66	05/25/2005	MOTION FOR POSTCONVICTION RELIEF FILED. PRO SE REFERRED TO JUDGE HERLIHY	
68	05/25/2005	MOTION FOR MODIFICATION OF SENTENCE FILED PRO-SE. (NOTE: DEFT. MOTION SAID MOTION FOR POSTCONVICTION RELIEF #66, BUT WAS A RULE 35 PRO-SE MOTION.	
67	06/01/2005	LETTER FROM A. HAIRSTON, PROTHONOTARY OFFICE TO STEVEN WOOD, DAG RE: NOTICE OF FILING OF PRO SE MOTION FOR POSTCONVICTION RELIEF. ATTACHED COPY OF MOTION. MOTION FILED ON VOP	
69	06/06/2005	ORDER MOTION FOR MODIFICATION OF SENTENCE DENIED. THE MOTION WAS FILED MORE THAN 90 DAYS AFTER IMPOSITION OF THE SENTENCE AND IS, THEREFORE, TIME-BARRED. PURSUANT TO SUPERIOR COURT CRIMINAL RULE 35(B), THE COURT WILL NOT	HERLIHY JEROME O.

*PETITIONER*SUPERIOR COURT CRIMINAL DOCKET
(as of 06/01/2005)

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State of Delaware v. ANTHONY L GAINES
State's Atty: RICHARD J ZEMBLE , Esq.
Defense Atty:DOB: 01/30/1962
AKA: ANTHONY GAINES
TONY GAINES

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*** END OF DOCKET LISTING AS OF 06/01/2005 ***
PRINTED BY: CSCAHAI

Certificate of Service

I, Anthony L. GAINES, hereby certify that I have served a true and correct cop(ies) of the attached: RESPONSE ANSWER to
DE. Deputy Attorney General upon the following parties/person (s):

TO: Thomas E. Brown
Deputy Attorney General
State Office Building
820 N. French Street.
Wilmington, DE. 19801

TO: U.S. District Court
Judge: Joseph J. FARNAN
844 King Street.
Wilmington, DE.
19801

TO: Thomas Carroll WARDEN
DE. CORRECTIONAL CENTER
1181 Paddock Road.
Smyrna DELAWARE
19977

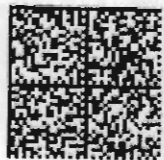
TO: Anthony L. GAINES
DE. CORRECTIONAL CENTER
1181 Paddock Road
Smyrna, DELAWARE
19977

BY PLACING SAME IN A SEALED ENVELOPE and depositing same in the United States Mail at the Delaware Correctional Center, Smyrna, DE 19977.

On this 1st day of DECEMBER, 2005

IM Anthony L. Graves
SBI# 181314 UNIT SHU-19B111
DELAWARE CORRECTIONAL CENTER
1181 PADDOCK ROAD
SMYRNA, DELAWARE 19977

United States District Court
844 King Street.
Wilmington, Delaware
19801



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